

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VALVE CORPORATION,)	
)	Case No. C02-1683Z
Plaintiff,)	
)	Seattle, Washington
v.)	September 16, 2004
)	
SIERRA ENTERTAINMENT, INC. (AKA)	
SIERRA ON LINE, INC.), et al.,)	
)	
Defendants)	
)	
SIERRA ENTERTAINMENT, INC. (AKA)	
SIERRA ON LINE, INC.), et al.,)	
)	
Counter-Claimants,)	
)	
v.)	
)	
VALVE CORPORATION, et al.,)	
)	
Counterclaim Defendants.)	
)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE THOMAS S. ZILLY
UNITED STATES DISTRICT JUDGE

For the Plaintiff:	Karl Quackenbush
	Jason Holtman
	Preston Gates Ellis
	925 Fourth Avenue, Suite 2900
	Seattle, Washington 98104-1158
For the Defendants:	Linda Q. Foy
	Howard, Rice, Nemerovski, Canady, Falk &
	Rabkin
	Three Embarcadero Center
	Seventh Floor
	San Francisco, California 94111-4065
	Michael R. Scott
	Hillis, Clark, Martin & Peterson
	500 Galland Building
	1221 Second Avenue
	Seattle, Washington 98101-2925

1 Joseph F. Roth
Official Court Reporter
2 600 U.S. Courthouse
Seattle, Washington 98104
3 (206) 553-1899

4 Proceedings recorded by computer-aided stenography.

5 (In-chambers conference.)

6 THE COURT: Let's go on the record. The defendants'
7 letter -- I gather you've traded letters with one another, but
8 one side -- I think the defense -- wanted a court reporter, so we
9 have a court reporter. And so the court reporter has the
10 caption, but why don't you make your appearances for the record.

11 MR. QUACKENBUSH: Karl Quackenbush representing
12 plaintiff Valve Corporation, Mr. and Mrs. Lynch and Mr. and Mrs.
13 Newell.

14 MR. HOLTMAN: Jason Holtman representing plaintiff Valve
15 Corporation, Mr. and Mrs. Lynch, Mr. and Mrs. Newell.

16 MS. FOY: Linda Foy representing the defendants and
17 cross-complainant Sierra, Vivendi Universal and Vivendi
18 Universal, S.A., International.

19 MR. SCOTT: Mike Scott, local counsel for defendants.

20 THE COURT: All right. This is a status conference
21 requested by the parties. Prior to the status conference
22 obviously I received from Mr. Quackenbush a letter dated
23 September 15th indicating why he wanted the meeting. And at my
24 request my law clerk asked that there be something provided to
25 us, so we would have some -- be alerted on what the issues were.

1 And the defense has given me -- Ms. Foy I think is the author
2 of the letter -- a letter, a two-page letter outlining from the
3 defendants' standpoint issues for discussion.

4 We've got basically an hour. So let's proceed first with
5 plaintiff and then we'll go to the defendants. So I guess -- and
6 I know that there are some motions to -- pending motions for
7 summary judgment, partial summary judgment, that are pending, but
8 they're not yet ripe for consideration. And I know that there is
9 a Valve -- there's a motion to compel discovery, which was
10 renoted till the 24th, I believe --

11 MR. QUACKENBUSH: Yes.

12 THE COURT: -- as a result of a stipulation of the
13 parties. So I really haven't looked at that either.

14 MR. QUACKENBUSH: Yes.

15 THE COURT: So, Mr. Quackenbush, what can we do to
16 assist the parties today in the time we have?

17 MR. QUACKENBUSH: Well, the issue we wanted to talk
18 about -- I think this was -- this session was organized primarily
19 by the defense, but the real time critical issue is the
20 destruction of these documents in Korea. The defendants produced
21 some documents to us in the original Korean language. It just so
22 happened that we had a summer clerk, a fellow by the name of
23 Eugene Kim, from the University of Washington law school, who's
24 Korean. So we asked Eugene what these documents said, and the
25 translation is set out there.

1 When we first notified counsel about this their first
2 response was, no, you're all wrong, there wasn't any document
3 destruction, don't worry about it. And then a week later the
4 message was we know that's what we said before, that was wrong,
5 and now we're looking into this. We're going to do an
6 investigation. And when our investigation is done we'll provide
7 this investigator to you and you can take his deposition. And
8 that's just not satisfactory to us. We want the two individuals
9 involved brought here at Vivendi's expense.

10 THE COURT: The two people being the one who sent the
11 email and the one who received it?

12 MR. QUACKENBUSH: Right. Mr. -- I'm sorry, Jason.
13 Thanks. Mr. Kwon and Mr. Jungwon Hahn, H-a-h-n. And, you know,
14 our feeling is that when something happens and you want to find
15 out what happened, you talk to the people who know, rather than,
16 you know, getting some filtered version of the official story.
17 We think we need to get this resolved right away.

18 THE COURT: What's your position?

19 MS. FOY: Your Honor, to an extent Mr. Quackenbush's
20 account of the incident is accurate. We were informed of the
21 belief there had been a destruction of some emails.

22 THE COURT: Sorry.

23 MS. FOY: We informed Valve's counsel we would conduct
24 an immediate investigation. We conducted an internal
25 investigation, a preliminary investigation, and believed that

1 there was an issue of deletion of some emails, but that they were
2 backed up and the copies existed.

3 On further investigation, we believe that the problem might
4 be more significant, and we decided at that point to retain an
5 independent investigator. We informed them that we would upon
6 the completion of the investigation provide either a 30(b)(6)
7 witness or a percipient witness, but that that would await the
8 completion of the investigation.

9 That's where things stood, and then we found ourselves
10 confronted with a motion to compel, which was premature, in that
11 the issue had never been brought to the Court. We have
12 repeatedly informed counsel that the investigation is under way,
13 it is not yet complete, and when it is complete, we will know the
14 scope of the potential witnesses.

15 We're also conducting a forensic analysis of the hard drives
16 to determine what, if anything, was deleted and whether it can be
17 recovered. But all of that awaits the findings of our
18 independent investigator.

19 THE COURT: Give me some idea of what -- who is the
20 independent investigator?

21 MS. FOY: They are counsel we've retained in Korea.

22 THE COURT: They're Korean counsel?

23 MS. FOY: Yes, they are. And we expect that --

24 THE COURT: And you say they're independent. Have they
25 been employed on some written basis, so there's sort of a letter

1 directing what they do and how they do it?

2 MS. FOY: There is an engagement letter.

3 THE COURT: And has that been produced?

4 MS. FOY: No, we -- again, Your Honor, we just received
5 this motion to compel from Valve.

6 THE COURT: Well, is there any reason why that should
7 not be produced to plaintiffs' counsel?

8 MS. FOY: No, there is no reason it can't be.

9 THE COURT: All right. Let's produce the letter. So
10 the letter of engagement, or letters, or agreements of engagement
11 should be produced.

12 Now, it's not satisfactory that you just tell me that when
13 the investigation is complete something further will happen.
14 First, timingwise, what are we talking about?

15 MS. FOY: They're conducting investigations and
16 interviews of the key witnesses who've been identified to date.
17 We don't know what further employees will have to be interviewed
18 and we don't know the scope of the forensic analysis that will
19 have to be done.

20 We expect that -- we informed them that we would like the
21 investigation done promptly and efficiently. And they began, I
22 believe, on September 8th, and we expect that if there are no
23 further interviews to be conducted, they should be completed
24 within the next two to three weeks.

25 THE COURT: Well, we're steaming up on -- this is a

1 pretty serious issue, if indeed evidence was destroyed. I can't
2 imagine that I would not permit Mr. Quackenbush to take the
3 depositions of the percipient -- in other words, the person who
4 sent the email, the person who received it, at the very least,
5 together with a 30(b)(6) witness.

6 Can a corporation designate as a 30(b)(6) witness someone who
7 is an independent lawyer that's been hired? Normally the
8 corporation identifies a person in the corporation who is the
9 speaking agent. I suppose that the corporation could designate
10 someone else as a speaking agent, but I've never seen it.

11 Have you even thought about that problem?

12 MR. QUACKENBUSH: I haven't seen it, and the problem
13 with that is that this is a lawyer who's employed by Vivendi.

14 THE COURT: I understand.

15 MR. QUACKENBUSH: And I don't know who these folks are,
16 and I assume they're honorable folks, but their client is
17 Vivendi. I assume if this person shows up to testify, and I'm
18 asking about who said what to whom, they're going to have the
19 same problem we had with Mr. Tan, which is the subject of one of
20 our motions to compel.

21 THE COURT: These people are lawyers that your company
22 has hired?

23 MS. FOY: Yes, Your Honor. It's precisely the opposite.
24 We felt it was extremely important to hire an independent
25 investigator outside the company who would not be an interested

1 party with respect to the --

2 THE COURT: Well, but would there be any later claim of
3 a privilege between the investigator attorney and the company?

4 MS. FOY: No, that's precisely what we contemplated.
5 They're conducting an independent investigation. Their
6 communications with the witnesses will not be protected by
7 privilege or work product.

8 MR. QUACKENBUSH: One other point, Your Honor, about
9 these two fellows. They're also percipient witnesses on our
10 claims. I mean, these are the country manager for Korea. Korea
11 is the biggest market in the world, biggest cyber-cafe market in
12 the world. So these guys have a lot of other information that --
13 we had asked for their depositions separately, you know, and --

14 THE COURT: Is there any reason why that shouldn't
15 proceed?

16 MS. FOY: Well, we're not willing to fly them to Seattle
17 for their individual witness depositions, and we've informed
18 counsel --

19 THE COURT: Well, it seems to me that one possibility is
20 that you get on a plane and go to Korea.

21 MR. QUACKENBUSH: That's one possibility.

22 THE COURT: And if you learn through that discovery that
23 documents have been destroyed, one of the possible sanctions --
24 and I don't mean to limit it to this -- but would be your cost of
25 travel.

1 MR. QUACKENBUSH: That's right.

2 THE COURT: And time to take the deposition. Another
3 alternative is to bring these people to Seattle, permit the
4 deposition, and reserve on who's going to pay for it until we
5 sort out what's going on.

6 But it seems to me that if documents have been destroyed,
7 it's likely the Court is going to order some sort of sanctions,
8 and one of the sanctions, but not the only sanction, would be the
9 costs of getting to the bottom of the problem.

10 If that means the cost of taking people involved, if that
11 means a 30(b)(6), or the investigator, or both -- is it cheaper
12 for him to fly to Korea or for the witness to come here? I mean,
13 what are the pros and cons of where we take the deposition? I
14 think other than --

15 MR. QUACKENBUSH: Yes.

16 THE COURT: -- other than this problem, I take it you
17 were expecting you'd have to go to Korea, you'd probably have to
18 go anyway.

19 MR. QUACKENBUSH: Well, we have several witnesses from
20 the Vivendi's Asia division that we'd like to talk to. We
21 suggested -- we approached counsel -- why don't we bring them
22 here. It's much cheaper to bring them here than have all of us
23 troop over there. That's just -- that was unrelated to this
24 problem. It's just me trying to be practical.

25 THE COURT: Have you sorted through that yet?

1 MR. QUACKENBUSH: They didn't like that, so --

2 THE COURT: How about Hawaii?

3 MR. QUACKENBUSH: That would be good, too.

4 THE COURT: Or some intermediate place. Then everybody
5 has to travel.

6 MR. QUACKENBUSH: This is getting better. That's even a
7 better suggestion.

8 MS. FOY: They intend to note depositions from witnesses
9 around the world, not just from Asia.

10 THE COURT: I understand.

11 MS. FOY: But with respect to Your Honor's initial
12 suggestion, I think it's premature to make a decision about who
13 should be flown where, because we don't know who the witnesses
14 are, who the percipient witnesses might be, and that is precisely
15 the scope of the investigation.

16 THE COURT: All right. I understand there's an ongoing
17 investigation. Have you committed to providing the report --
18 does the engagement letter require this outside independent
19 investigator to provide a written report?

20 MS. FOY: We haven't specified a written report, but
21 what we have offered to do is to produce the investigator as a
22 30(b)(6) witness on the subject of the alleged document
23 destruction by Korean employees.

24 Again, the scope is not known. As far as we know,
25 destruction, if it occurred, is limited to lower-level employees.

1 The country manager did not give a directive and did not himself
2 destroy documents.

3 THE COURT: But I think Mr. Quackenbush is entitled to
4 do his own investigation of this issue. And I'm not sure that he
5 has to wait until your person gets done doing whatever they're
6 doing.

7 I mean, I can conceive of those people doing an
8 investigation, maybe issuing an oral report, not even a written
9 report, and then you produce him, and he maybe has or doesn't
10 have notes of people he's talked to, Mr. Quackenbush may or may
11 not be satisfied with the scope of the investigation, or who they
12 talked to.

13 I mean, I just think we're -- I think it's unlikely, frankly,
14 that -- particularly with this all occurring in a foreign
15 country, with -- and we don't know the relationship between your
16 client and this other firm. You tell me it's independent. I'll
17 take that at face value. But, nevertheless, it may be less than
18 satisfactory to the plaintiffs.

19 I'm inclined -- and it's an important issue, and it involves
20 a lot of expense, so I want to get your reaction. But I'm
21 inclined to say to Mr. Quackenbush and to the defense that he can
22 go to Korea and he can take those depositions now.

23 And if in the discovery process we learn that there was
24 meaningful destruction of documents or other bad things that
25 occurred that shouldn't have occurred, that all or a portion of

1 his expenses will be assessed against the defendants.

2 If he comes up with nothing, then -- I assume in the normal
3 course I probably wouldn't be in a position to order their
4 witnesses from Korea to come here. I mean, it might be a nice
5 thing to do in terms of all the lawyers being here, but I think
6 that if you're going to sue people who do business in Korea, you
7 probably have to go to Korea, don't you, to take their
8 depositions?

9 MR. QUACKENBUSH: I think that's right. And certainly
10 we'll do that. I was just trying to save everybody some expense.
11 I mean, we're going to troop a bunch of lawyers and a court
12 reporter and a translator and everybody else over there.

13 But, you know, on the document destruction issue, though, it
14 seems to me like we're not really -- there isn't really any
15 dispute the documents were destroyed, and it seems to me like one
16 of the -- one of the appropriate sanctions would be that the two
17 actors that we know about come here and give their depositions
18 here in the near time, because we're kind of running out of time.

19 THE COURT: Well, but you tell me that both these people
20 are key witnesses that you're going to have a lot of other things
21 to discuss with of them.

22 MR. QUACKENBUSH: That's right.

23 THE COURT: Are there other things that you would be --
24 or could do in Korea at the same time. I know one of the issues
25 is should discovery on some of these things go forward in light

1 of the pending motions for partial summary judgment. And maybe
2 we should move to that, just to get a flavor for the problem and
3 the issues.

4 MR. QUACKENBUSH: To answer your question, sure, there
5 are -- if we're going to go, I would want to get everybody done
6 that we need to do.

7 THE COURT: Sure.

8 MR. QUACKENBUSH: Sure. That's absolutely true.

9 THE COURT: And are you in a position now to do that, or
10 are you needing to get document production and the like before
11 you take the depositions?

12 MR. QUACKENBUSH: Well, that's a whole other question.
13 I have a lot to talk about with regard to Vivendi's document
14 production either today or some other time, when it's more
15 convenient.

16 But we'll go now, because we're running out of time. And I'm
17 worried that we're going to -- you know, we're getting pushed
18 back up against our discovery cutoff. This is the biggest --
19 this is where the most infringer profits were earned. And I can
20 see why these fellows -- I don't know, but I'm going to speculate
21 these fellows would have a motive to destroy documents, because I
22 think they know that they weren't supposed to be doing what they
23 were doing, and that there's big money involved.

24 Now, that's just me talking. Maybe I can prove that, maybe I
25 can't, but I can't -- I don't have the opportunity unless I go,

1 and so we need to go as soon as possible.

2 THE COURT: Do you want to talk about -- the other
3 motions, I think, are noted for October 8th, or October 1st,
4 perhaps. Are they all noted for October 1st?

5 THE LAW CLERK: I think the 8th.

6 THE COURT: The 8th.

7 MR. QUACKENBUSH: The 8th are the summary judgment.

8 THE COURT: Defendants' motion for partial summary
9 judgment noted October 8th. Defendants' motion for partial
10 summary judgment re contractual rights, October 8th. And then
11 the plaintiffs' cross-motions are also noted for the same date.
12 So everything is noted for the 8th.

13 MR. QUACKENBUSH: Right.

14 THE COURT: As a practical matter, I'm going to be out
15 of the district for two weeks in the middle of October. I'm
16 probably not going to get to those motions and resolve them until
17 early November. You've got a discovery cutoff of November 18, I
18 think.

19 MR. QUACKENBUSH: Correct.

20 THE COURT: We may have to adjust that. We may have to
21 adjust the trial date. But I think that discovery has to go
22 forward. The fact that -- I mean, I haven't seen -- I haven't
23 looked at, because you've got a noting date of October 8th --
24 presumably they were just recently filed. But we looked at that
25 issue, didn't we? Was it a motion for a preliminary injunction,

1 or was there a motion to dismiss.

2 MS. FOY: A motion to dismiss.

3 MR. QUACKENBUSH: A motion to dismiss.

4 THE COURT: Motion to dismiss.

5 MS. FOY: And at that time the motion was denied, but
6 the Court instructed defendants that this issue should be
7 addressed on a motion for summary judgment and resolved earlier
8 rather than later.

9 THE COURT: Well --

10 MS. FOY: And that it is an issue of law and that the
11 parties --

12 THE COURT: Has all the discovery been done with respect
13 to the cyber-cafe rights?

14 MR. QUACKENBUSH: We think it has. Not with regard to
15 the damages and the revenues. That's a more problematic issue.

16 THE COURT: And have we ever talked about bifurcation?

17 MR. QUACKENBUSH: (Shakes head.)

18 THE COURT: And is that a good thing or a bad thing? I
19 mean, I'm just wondering if we bifurcated damages by a couple of
20 months and tried the liability, would there be such a -- and I'm
21 not going to decide this today. I'm just thinking out loud,
22 trying to see what's the best way to manage this case and how to
23 proceed.

24 But are a lot of those witnesses on damages going to be the
25 same as liability?

1 MS. FOY: Your Honor, I think that this issue dovetails
2 with many of the other scheduling issues that we wanted to raise
3 today, the timing of these motions. If I could go into our
4 topics and --

5 THE COURT: Well --

6 MS. FOY: I think bifurcation could be absolutely
7 appropriate given the stage of discovery and the fact that the
8 vast majority of pending depositions that Valve apparently
9 intends to take in October deal with lost profits and damages
10 issues, which are certainly premature in view of the pending
11 motions. I believe the cross-motions should be decided before
12 any further discovery on damages goes forward. It would be
13 extremely burdensome and expensive for both sides.

14 THE COURT: Well, let me ask you this. I know
15 plaintiffs never like bifurcation and they don't like to think
16 that their trial date is in jeopardy. But another way to maybe
17 look at the problem of everything that has to be done and how you
18 do it in some orderly fashion, what about deferring discovery on
19 the damages and saying -- and moving that deadline, in other
20 words, do everything but the damages, and move that discovery
21 deadline to the end of January, or the middle of February? There
22 are not going to presumably be dispositive motion problems
23 dealing with damages. Now, maybe there will be. I don't know.

24 MR. QUACKENBUSH: Well, there is one pending. There's
25 cross-motions pending on whether the plaintiffs' copyright

1 remedies are eliminated by the contract limitation. So that's --
2 that's a --

3 THE COURT: All right.

4 MR. QUACKENBUSH: But there would be -- there would
5 still be other damages issues --

6 THE COURT: Right.

7 MR. QUACKENBUSH: -- regardless of how that motion is
8 decided.

9 THE COURT: In fact, that is kind of a legal issue.

10 MR. QUACKENBUSH: Yes, it is.

11 MS. FOY: Yes.

12 THE COURT: But having in mind that it's unlikely you're
13 going to have, under the best of scenarios, going to have a
14 ruling on these motions before early November, would an
15 opportunity to take damage discovery until the middle or the end
16 of -- let's say the end of January, would that help everybody in
17 terms of preparing this case, or would that be something that you
18 don't want to entertain?

19 MR. QUACKENBUSH: Could we keep our trial date?

20 THE COURT: Well, I'm not -- this would be -- I'm not
21 saying the trial date is moving. I'm just trying to
22 understand -- I mean, one of the issues, and I gather a lot of
23 what your concerns are, is the plaintiff wants to do a lot of
24 damage discovery, which may become not relevant if you win on
25 your partial motions.

1 MS. FOY: That's right.

2 THE COURT: Let me ask, Mr. Quackenbush: Do you agree
3 that if I were to rule in their favor -- and I'm not suggesting
4 that in any way, but on their interpretation of what the
5 agreement means, would that affect a lot of the damage discovery
6 that you'd otherwise be doing?

7 MR. QUACKENBUSH: I'm not sure that a lot would be a
8 good way to state it. Some, probably. But even under the
9 scenario where you grant both motions, both of defendants'
10 motions, which we're -- we don't think will happen. We think you
11 should grant our motions.

12 THE COURT: I understand.

13 MR. QUACKENBUSH: It probably goes without saying. But
14 there would still be damage discovery left to do. I mean, the
15 contract doesn't say you get a completely free pass on breaches
16 of contract. You don't. So we would have direct damages
17 discovery.

18 So I think the answer is it would make it less, sure, but I
19 can't -- I can't quantify that right now. I'd have to go back
20 and really work through that.

21 THE COURT: Well --

22 MS. FOY: Your Honor, I think the --

23 THE COURT: Well, let me ask you this: Can we put him
24 on time out and let him just sit there maybe? You asked for a
25 court reporter. Do you want all this reported?

1 MS. FOY: I would like it all reported so there's no
2 disagreement. Is there a problem with continuing --

3 THE COURT: No, I just -- this is -- we're just
4 exploring various possibilities. If we get to a point where I
5 tell you that I'm going to rule on something, I'd let you make
6 your arguments on the record. But we'll stay on the record. Go
7 ahead.

8 MS. FOY: I think the proposal to defer discovery on
9 the -- on damages until after the -- until the beginning of the
10 year, and specifically after the ruling on the cross-motions, is
11 far more efficient case management for this case.

12 In fact, the vast majority of the discovery during the last
13 several months has been on lost profits, witnesses on lost
14 profits, cyber-cafe profits, multiple, hundreds of thousands of
15 spreadsheets and other financial documents, and we're continuing
16 to try to locate and produce those documents, all of which would
17 be moot if the Court --

18 THE COURT: Let me just clarify, Ms. Foy. Nothing I've
19 said would impact or affect the defendants' obligations to
20 produce written discovery.

21 MS. FOY: I understand.

22 THE COURT: Documents that have been ordered or
23 requested, or for which there has been no objection. What I'm
24 doing is limiting my -- what about this proposal to the actual
25 taking of depositions dealing with damages?

1 MS. FOY: Only the depositions?

2 THE COURT: Only the depositions. Because if we did
3 delay damage discovery and deposition discovery, you've still got
4 to get the documents and all of the -- and I don't want to let
5 two more months go by before we do that, frankly.

6 MS. FOY: In that event, one of the other issues we've
7 raised, and it would still be on the table, is a desire to avoid
8 having to search for and produce documents such as invoices and
9 letters of credit, all of the information on which is already
10 reproduced in summary documents that we have and are producing.

11 And, again, this is related to --

12 THE COURT: Let's just walk through your letter.

13 MS. FOY: I'd like to start with Mr. Newell's issues, if
14 I might.

15 THE COURT: That's the destruction of documents.

16 MS. FOY: Yes. This is an issue of, I think, far
17 greater potential seriousness than the Korean documents issue.
18 This is an issue of potential spoliation by the founder and CEO
19 of Valve, who is a defendant in the case, a cross-defendant, who
20 has been -- is a defendant with respect to the fraud claim, and
21 who apparently wiped his computer clean in the fall of 2002 -- or
22 '3, I'm sorry, one year into this litigation.

23 And in October of 2003 we requested an explanation from
24 plaintiffs' counsel, what happened to the hard drive, was it
25 mirrored, were copies kept, what happened to these documents, and

1 we were given no explanation. And repeatedly requested an
2 explanation. It's been almost a year and we've still got no
3 explanation of what happened to those documents.

4 Finally, with Mr. Newell's production we discovered that
5 almost no electronic documents were produced for the entirety of
6 2000 or 2001. This is a critical period. This is the period
7 during which the parties were negotiating the software publishing
8 agreement, the period during which we believed that Valve engaged
9 in a fraudulent concealment of its development of Steam. Not a
10 single electronic document was produced to Mr. -- sourced to Mr.
11 Newell for that entire two-year period.

12 THE COURT: Has his deposition been taken?

13 MS. FOY: It has not yet been taken. We took the
14 deposition of the 30(b)(6) witness, the technical expert, who
15 purportedly was in a position to testify as to what happened with
16 Mr. Newell's hard drive.

17 We don't assume that Mr. Newell would know what happened or
18 whether it was mirrored, but certainly this expert witness should
19 have, the 30(b)(6) witness, and they were unable to give us an
20 adequate explanation.

21 We were told that Mr. Newell reformatted his hard drive in
22 late 2003, but it appears that all of the electronic documents
23 and emails from 2000, 2001 were deleted.

24 THE COURT: Have you made a motion in regard to this
25 matter?

1 MS. FOY: We are seeking leave at this conference to
2 bring such a motion pursuant to the Court's instruction that we
3 raise such issues in a discovery conference before filing.

4 THE COURT: Mr. Quackenbush, it seems to me it's a
5 legitimate issue for a motion.

6 MR. QUACKENBUSH: It's not actually when you understand
7 what really happened, and I would like to explain that.

8 THE COURT: All right. Equal time, but not greater.

9 MR. QUACKENBUSH: I'll do my best. Yes, Your Honor.

10 THE COURT: All right.

11 MR. QUACKENBUSH: This issue -- and all these issues in
12 this letter are sort of an example of a good defense is a good
13 offense. We've explained this more than once. What happened,
14 Mr. Newell's hard drive got a virus. They found a program
15 running in the background called backdoor.exe. So they did what
16 everybody would do in that situation, they reformatted the hard
17 drive.

18 What Ms. Foy didn't mention and which we've explained, and
19 which produced a 30(b)(6) witness to explain in detail, was that
20 Mr. Newell's hard drive was backed up. And that so after they
21 reformatted they reinstalled all the documents onto his hard
22 drive, and his hard drive has been searched. So there weren't
23 any documents destroyed.

24 THE COURT: His hard drive has been searched by your
25 people?

1 MR. QUACKENBUSH: Yes.

2 THE COURT: And are you saying that there were no
3 documents for -- she says they didn't produce any documents for
4 some period of time.

5 MS. FOY: For two years.

6 THE COURT: Two years, one year, two years. Is that
7 possible that there's nothing to produce?

8 MR. QUACKENBUSH: Well, we actually, you know, talked
9 about this issue last Thursday. We had a big discovery
10 conference with opposing counsel. We talked about this issue.
11 They asked more questions. I said, look, I'll go back and check
12 again. I think the story that we've been giving you is correct,
13 but I'll go back and check again just to make sure.

14 But we already produced a 30(b)(6) witness who testified
15 about this. And I'm happy to go back and check again. I'll
16 check a third time. And Mr. Newell will give a deposition about
17 it, but the story isn't going to change. That's what happened.
18 If counsel wants to bring a motion about this, this will be the
19 response.

20 THE COURT: It doesn't seem like -- I mean, it seems to
21 me that what defendants ought to do is go take this guy's
22 deposition and take anyone else's deposition you want. And then
23 your motion is for sanctions, or if you find that things were
24 erased or not produced or -- what are we going to accomplish in a
25 motion? I get your argument. I get his argument. What would I

1 decide? Wouldn't I say I need more information? And it's a
2 factual issue, isn't it?

3 MS. FOY: We noticed and took what we thought was the
4 appropriate deposition. Mr. Newell may not know whether his hard
5 drive was mirrored.

6 THE COURT: You will not know that until you talk to
7 him.

8 MS. FOY: No, but we did ask for the deposition of a
9 30(b)(6) witness who did have that information. What he told us
10 was Mr. Newell's hard drive was reformatted, but that if Mr.
11 Newell or anyone else had deleted files or deleted documents,
12 those documents or files would not have been backed up and would
13 now have been reformatted.

14 THE COURT: So what you're saying is the 30(b)(6) person
15 couldn't tell you whether something had been deleted or not?

16 MS. FOY: That's correct. And we would like a further
17 30(b)(6) deposition on this issue. Mr. Newell may be the
18 appropriate person or the technical expert --

19 THE COURT: Well, it seems to me that Mr. Newell is
20 certainly a good place to start. What are you waiting for?

21 MS. FOY: Well, we'd like to wait and complete the
22 document production to take his individual deposition. So that
23 if we would be permitted to take his deposition on this limited
24 issue and go back to him again --

25 THE COURT: Is Mr. Newell here in the United States?

1 MR. QUACKENBUSH: Sure.

2 THE COURT: What's wrong with letting them do a limited
3 deposition on this issue?

4 MR. QUACKENBUSH: Well, I mean they're going to take his
5 deposition anyway. It seems like -- our document production is
6 going to be done a week from tomorrow.

7 THE COURT: So why not wait until after that?

8 MS. FOY: Because what we believe is the case is that
9 there must be electronic documents.

10 THE COURT: Well, I understand, but you're not going to
11 get to the bottom of it until you talk to him and perhaps other
12 people. It seems to me that you should go ahead and do more
13 discovery and then come back to the Court.

14 I mean, I don't know how I could possibly sort out this issue
15 based on what you know or believe, or don't know at the present
16 time. I mean, I think it would be a motion that would be --

17 MS. FOY: The motion would be for a further 30(b)(6)
18 deposition of someone who has done a proper investigation to
19 determine whether there was a mirrored --

20 THE COURT: But how am I going to decide whether the
21 first guy did or did not do a proper investigation? You've got
22 to talk to Mr. Newell.

23 MS. FOY: We don't believe Mr. Newell conducted the
24 investigation.

25 THE COURT: Well, he's the guy that you say deleted

1 something.

2 MS. FOY: We believe that documents were deleted because
3 no documents were produced for a two-year period during which
4 there were critical negotiations.

5 THE COURT: Well, then what you're really saying is that
6 you've taken the 30(b)(6) that they've tendered up and that
7 30(b)(6) person was not the right person and didn't have the
8 information?

9 MS. FOY: That's right.

10 THE COURT: Well, then maybe you make a motion to -- for
11 sanctions and whatever else you want based on that fact. We can
12 at least look at the 30(b)(6) record that we've got, and we can
13 decide if this guy was or was not proper -- was a proper
14 30(b)(6). But if we conclude that he was, then I'm not going to
15 order another 30(b)(6). So I think that's the risk that you
16 take.

17 If you want to make the motion, you can make the motion. But
18 I think that's the motion, that the 30(b)(6) guy wasn't the
19 proper -- you can make any motion you want related to this issue.
20 All I'm saying, my initial reaction is that if you make the
21 motion in the abstract that he's deleted stuff and this is all
22 terrible, and he comes back and says what he says, and we've got
23 a 30(b)(6) guy that's told them what we know, we're going to have
24 to look at that 30(b)(6) testimony. And I'm not hopeful that I'm
25 going to be able to get to the bottom of it based on where you

1 are today.

2 MS. FOY: I think where we are today is that we would
3 like to take a limited deposition of Mr. Newell, specifically on
4 the issue of his erasure of his hard drive, and take a further
5 30(b)(6) witness deposition with respect to the issue of any
6 investigation that was done, what happened to the -- whether his
7 hard drive was mirrored.

8 THE COURT: Did you note up a request for a 30(b)(6) on
9 what investigation was done and the like?

10 MS. FOY: Yes, we did.

11 THE COURT: And they produced someone?

12 MS. FOY: They produced someone who could not give
13 answers.

14 THE COURT: Well, I'm not going to -- Mr. Quackenbush,
15 are you willing to produce another 30(b)(6) witness?

16 MR. QUACKENBUSH: Well, Your Honor, we'll produce
17 another witness if you order us to. We produced the guy who
18 knows what happened. He gave the testimony. Counsel didn't like
19 the testimony. But it's what happened.

20 THE COURT: Where is Mr. Newell? Is he in Seattle?

21 MR. QUACKENBUSH: Yeah, he's the CEO of the company.

22 THE COURT: All right. I'll permit a limited deposition
23 of Mr. Newell on the subject of the hard drive and any deletions,
24 et cetera, one not to exceed one day, seven hours, on that
25 subject, without -- but I'm not going to order another 30(b)(6)

1 person to be designated at this time.

2 But I will permit you to make a motion teeing up that whole
3 issue. In which event I'd have to look at the 30(b)(6) that was
4 tendered and what the person said, and make a decision whether
5 they need to do something more, or whether any sanctions are
6 appropriate, or whether this is a non-issue. I certainly can't
7 decide it today.

8 All right. So a one-day limited deposition, deny your
9 request for another 30(b)(6) without prejudice, authorize you to
10 file a motion relating to the Newell issue. Are you clear on
11 that?

12 MS. FOY: Yes. I also wanted to ask Mr. Quackenbush to
13 follow up on the -- in the interval to follow up on his offer to
14 actually find out the answer to the question about the hard
15 drive, so we can save a great deal of time.

16 MR. QUACKENBUSH: You know, the funny thing about this
17 -- I'm happy to do that, which is what I said in our meet and
18 confer on Thursday. And then the next thing I got was this. And
19 then last night filed a motion.

20 So, you know, I'm happy to proceed as counsel are supposed to
21 proceed and work these things out without bringing them to the
22 Court. I'm happy to provide whatever information I have. I've
23 already done it. I'll do it again.

24 THE COURT: Well, I mean, one of the problems, Ms. Foy,
25 is that once you bring the motion, then it seems to me it takes

1 it off the informal --

2 MS. FOY: We have not brought a motion on this issue.

3 MR. QUACKENBUSH: Well, what are we doing here?

4 MS. FOY: We have not brought a motion on Mr. Newell's.

5 THE COURT: All right. Let's go on. The stay of the
6 cyber-cafe discovery pending resolution, 16 depositions requested
7 by Valve. Are these liability or damage?

8 MR. QUACKENBUSH: Well, they're really both.

9 THE COURT: Both.

10 MR. QUACKENBUSH: They're what happened witnesses and
11 what did it cause witnesses.

12 THE COURT: And --

13 MS. FOY: They are cyber-cafe discovery. I think the
14 issue is the resolution -- the issue is the resolution of the
15 cross-motions, which are not simply limited to damages, but the
16 broader issue of rights to cyber-cafe distribution. And if that
17 issue is decided in defendants' favor, all of these -- 13 of the
18 16 depositions and 23 of the 25 30(b)(6) topics will be moot.

19 So we're asking for a stay pending the Court's resolution of
20 motions. And this is an additional reason from the scheduling
21 perspective, particularly if the Court will not be available to
22 rule on these motions until November 1st. But it is extremely
23 inefficient to go forward on those depositions.

24 THE COURT: Don't get locked in on November 1st. I'm
25 out of district for two weeks. I'm sitting in another district

1 trying a criminal case. I'm going to be occupied. And no doubt
2 when I get back my law clerks will have piled up a whole bunch of
3 work for me, one of which will be this one.

4 But, Mr. Quackenbush, let's just talk practicalities.

5 MR. QUACKENBUSH: Okay.

6 THE COURT: I would imagine that your client probably
7 doesn't want to spend the money to take a whole bunch of
8 depositions which may not be necessary if you lose the motions.
9 So is there a solution around this? From your vantage point, you
10 want to go ahead and take -- she says 13 of the 16 wouldn't be
11 taken if she wins. Now, I don't know if she's going to win or
12 not.

13 MR. QUACKENBUSH: Your Honor, we want to go forward with
14 the discovery, because we feel very confident about the motions.
15 We have a very -- we're running out of time. We want to keep our
16 trial date. I'm perfectly willing to be practical, but, I mean,
17 we're out of time to be talking about this. The time to have
18 been talking about this was, you know, months ago.

19 And, you know, we've had a really difficult time getting the
20 discovery we need. You know, we're working on it every day.
21 It's not going to get any easier by if we postpone these guys.
22 We've got to just work through this and get it done.

23 THE COURT: Well, let me ask you this. I'm always
24 looking for kind of compromises that -- if I were to continue the
25 discovery cutoff until the end of the year, not change the trial

1 date, and not tell you what you could do or not do before I
2 decide those motions, would there be some of this discovery that
3 just from a practical standpoint you would set -- you would wait
4 until you got the answer to this before you spent the money?
5 Would that make sense?

6 MR. QUACKENBUSH: Well, certainly we have to go forward
7 with -- it seems to me certainly we would have to go forward with
8 the documents, otherwise you get the documents in January and
9 your pretrial order is due.

10 THE COURT: I'm talking about depositions.

11 MR. QUACKENBUSH: Yeah, I think there are probably
12 witnesses we could defer. I would have to go through them
13 one-by-one.

14 THE COURT: Some of the witnesses, I gather, would be
15 both damages -- would have information -- potential information
16 on all sorts of subjects, so you're going to have to talk to them
17 anyway.

18 MR. QUACKENBUSH: Yeah. I mean, I don't think there
19 would be any reason to defer any of the depositions of people who
20 are here. I don't think it would be fair to defer depositions of
21 the guys in Korea, because we really need to understand what's
22 going on there. And that's the -- you know, that's the biggest
23 single sore spot in this whole deal, is Korea.

24 THE COURT: So when you take the guys that are here and
25 the guys that are in Korea, how many of the 16 are left?

1 MR. QUACKENBUSH: Probably -- I'm not sure. I have the
2 list. Probably eight. Not counting Mr. Hahn and Mr. Kwon, one,
3 two, three, four, five, six, six -- six. Let me just
4 double-check that. Yeah, that's right.

5 THE COURT: What would be your kind of reaction to that
6 kind of proposal? Not limit what either side could do, but give
7 you more times in hopes, in hopes that you would sit down and try
8 and organize your calendars and what you needed to do, so that
9 you could do what you thought you wanted to do without my
10 arbitrarily saying you can or can't do something. But
11 hopefully -- and I say this hopeful over and over, but hope that
12 you would be able to look at the money you're spending and what
13 you're doing, and maybe some of this discovery could be deferred.

14 MS. FOY: I think the principal that should dictate how
15 the case is managed and how discovery should go is not where
16 people are located, but what the orderly treatment of issues is
17 going to be. And the extent to which these witnesses -- and it
18 is to my count 13 of the 16 individual witnesses and 23 of the
19 30(b)(6) topics deal with cyber-cafes or damages.

20 THE COURT: Have these depositions been noted at the
21 present time?

22 MR. QUACKENBUSH: No.

23 THE COURT: Not scheduled.

24 MR. QUACKENBUSH: No. We sent a letter asking for dates
25 on August 27th, and we haven't heard anything.

1 MS. FOY: The 30(b)(6) has been noticed. This just came
2 up within the past couple of weeks. It has not been pending for
3 weeks or months.

4 MR. QUACKENBUSH: I just -- Your Honor, it's hard for me
5 to see how we -- we defer the discovery in the case pending
6 resolution of the motions, which will be presumably decided
7 sometime in November, even if you say we're going to kind of
8 stage this.

9 You're still right up against pretrial disclosure, pretrial
10 order, exhibit exchanges, deposition designations. Boy, really
11 -- you're really jamming up the plaintiffs in that situation.

12 MS. FOY: Certainly less so if the case is bifurcated.

13 THE COURT: Let me ask you this: Would your position be
14 the same if I let you go ahead and do whatever you want to do,
15 but if I ruled in their favor and dismissed I would reserve the
16 right to come back at you then and say you really didn't need or
17 shouldn't have taken these depositions and impose some terms
18 against you?

19 I mean, I don't know -- I haven't read your motions.

20 MR. QUACKENBUSH: I understand.

21 THE COURT: I don't know how strong -- but I'm just
22 trying -- she says she's got a strong motion and you're not ever
23 going to see this stuff or do this stuff, because she's going to
24 win.

25 And if ultimately -- you know, I wouldn't -- I wouldn't do it

1 unless I ultimately concluded that there was no really good,
2 legitimate arguments that you were raising. And I suspect that
3 there will be some legitimate arguments. Whether they're enough
4 to avoid summary judgment, I don't have a clue. I'm just trying
5 to see how confident you are about going forward with all this
6 discovery.

7 MR. QUACKENBUSH: Well, we're very confident about those
8 two issues that are noted for cross-motion. We would definitely
9 go forward and spend that money, because we think we're going to
10 be trying the case.

11 THE COURT: All right.

12 MR. QUACKENBUSH: Now, you know, the issue of
13 bifurcation -- by that I assume we're talking about bifurcation
14 of the trial?

15 THE COURT: Well, that's a possibility also. I mean,
16 I'm not going to rule on that today.

17 MR. QUACKENBUSH: Okay.

18 THE COURT: I'm just trying to see is there a way to
19 manage the case in a way that your companies don't both spend
20 zillions of dollars, one of the parties doing it needlessly, if
21 in fact a good portion of it can be removed from the case as a
22 result of a motion.

23 MR. QUACKENBUSH: Yes, the problem with the
24 bifurcation--

25 MS. FOY: Would it not be both parties doing it

1 needlessly?

2 THE COURT: Well, the one who --

3 MR. QUACKENBUSH: The problem with the bifurcation in
4 this kind of -- if the motions are decided in our favor, as we
5 think they should be, and the unauthorized -- the cyber-cafe
6 distribution is outside the scope of the license, as we think it
7 is, then really what you're left with is a damages case. You
8 know, you're either an infringer or you're not, you either have a
9 license or you don't. And then you're left with, you know,
10 damages --

11 THE COURT: But you've got, as I recall, breach of
12 contract, you've got other issues, other theories.

13 MR. QUACKENBUSH: Right.

14 THE COURT: And, of course, they've got counterclaims.

15 MS. FOY: Counterclaims.

16 MR. QUACKENBUSH: Yes, that's right.

17 THE COURT: All right. Here's what I'm going to do.
18 Not perhaps a -- nobody is probably going to like this, but I'm
19 not going to stay discovery. I am going to extend the discovery
20 cutoff till December 31st. And I'm going to urge the parties to
21 go back and look at what they think they really want to do, need
22 to do, before we resolve these pending motions.

23 And, again, I use the word "hope" that you will schedule your
24 discovery that you're going to decide before I decide those
25 motions, having in mind that maybe some of them could be

1 deferred.

2 But I'm not going to second-guess you if you decide you're
3 going to take a deposition. I'm not going to tell you that you
4 can't do it. So it's kind of up to you. But it will take a
5 little bit of the pressure off hopefully by extending the
6 discovery cutoff and give you an opportunity to maybe reevaluate
7 where you are.

8 MS. FOY: Your Honor?

9 THE COURT: Now --

10 MS. FOY: Your Honor?

11 THE COURT: Yes.

12 MS. FOY: Would it be possible to set the hearing on the
13 cross-motions at this time?

14 THE COURT: Oral argument?

15 MS. FOY: Yes.

16 THE COURT: Well, no, I'm not going to do that until I
17 read the motions. I may be able to decide it on the paper.
18 We've got -- your item three is production of source codes.

19 MS. FOY: Yes. I regret that we have to bring this
20 issue to the Court the third time. We still have not received
21 source codes. Valve has imposed unreasonable conditions on a
22 protective order before producing source code. The two
23 conditions specifically are they refuse to let the source code to
24 leave the offices of outside counsel for analysis by our forensic
25 consultant.

1 And our consultant tells us that they absolutely need to use
2 the facilities of their laboratories, specialized equipment and
3 specialized software, and it would be extremely burdensome and
4 impractical for them to move their laboratory to our offices.

5 The second condition that Valve wishes to impose is a
6 prohibition on compiling any of the source code. Again, our
7 expert tells us that he must do that in order to run the games to
8 see how they work, to determine how, as they say, buggy the games
9 are at various stages, and to determine the pace and scope of
10 development.

11 So we've objected that these restrictions aren't reasonable.
12 They're certainly beyond anything that the Court suggested at the
13 July 30th telephonic conference. And we appear to be at an
14 impasse on this.

15 We need the source code immediately, and we've just been
16 unable to reach an agreement as to how they should be produced.

17 THE COURT: Mr. Quackenbush, do you think she has
18 accurately described where you guys are?

19 MR. QUACKENBUSH: No. Let me tell you, I'm glad that
20 this -- we're talking about this issue. Here 's what happened.
21 We had a hearing -- telephonic hearing with Your Honor on the
22 30th. We said we would produce the source code in any form. And
23 Your Honor said work out an agreed protective order that would
24 give you adequate protection on your source code.

25 We sent over a proposed form of order on August 12th. We

1 transmitted a proposed form of order on August 12th. On
2 September 7th -- we didn't hear anything until September 7th,
3 last Tuesday, when we got a letter saying we don't like your
4 order.

5 Then we had a call about it on Thursday, last Thursday. I
6 said what don't you like. They said we don't like the fact that
7 you have to look at the source code on premises. I said help me
8 understand that, because I've never had anybody push back on
9 this. I mean, these guys know a lot about software, but, you
10 know, I know something about it. I've been involved in some
11 software cases over the years. I've never had anybody push back
12 on this.

13 I said what special tools would you need. What would you be
14 talking about? Because what you're talking about is looking at
15 this stuff on a computer, which your expert can load up with
16 whatever software tools he wants and come over to your office.

17 But this is the most valuable asset of the company, and we
18 don't want it out flying around in who knows where. Just explain
19 to me, all I said is explain to me why that's a problem, and all
20 I get is, well, our expert says it would be a problem. And I
21 said but why, you know, practically why is it a problem? No
22 explanation.

23 On the compiling thing, they said, well, we need to compile
24 this. This is a complete mystery to me, why anybody would need
25 to compile our source code. As I'm sure you know, you take the

1 source code, which is the work product that the developers do,
2 the text, you run it through a software program called a
3 compiler, which gives you what's called an executable program,
4 which is the thing you buy at the store, all right? It's the
5 game, right?

6 But it's unreadable. It's unusable other than to try to run
7 it. So if what they're saying is we want to take all these
8 developmental versions of the game, which aren't -- are not
9 complete, compile it, and determine they don't run, I say, well,
10 what does that prove? What in the world would that prove?

11 The danger is -- the most dangerous thing that could happen
12 is that the code gets compiled into an executable file and that
13 finds its way onto the Internet.

14 You know, this is -- so you understand, these games are the
15 most popular PC games ever. Half-Life is the most popular PC
16 game ever. Valve got hacked last year. Somebody stole the
17 source code, posted some of it to the web. A horrible problem.
18 Had to get the FBI involved, tracked the kid down in Germany who
19 hacked in, arrested him. There's a lot of interest with these
20 game guys in getting this stuff.

21 Now, I'm not saying these guys are going to be careless. I
22 don't think they are going to be careless. I think the
23 protective order -- I think they'll honor the protective order.
24 But I just wanted to find what's the practical reason that these
25 things which seem pro forma to me don't work.

1 THE COURT: I need more information before any decision.
2 Why don't you tee up in some fashion by next Monday or Tuesday,
3 give us a copy of the proposed protective order, you tell us why
4 you don't like it.

5 MS. FOY: Your Honor, we have.

6 THE COURT: Well, then you have. Is it in writing?

7 MS. FOY: Yeah. We just yesterday filed a motion on
8 this issue because the issue has been pending.

9 THE COURT: I see. How soon can you respond to the
10 motion? Can you respond on an expedited basis, and can we get a
11 response by --

12 MR. QUACKENBUSH: We can respond in a week.

13 THE COURT: Okay.

14 MR. QUACKENBUSH: Again, though, I just want to make
15 sure that I've been clear about the context here. I was trying
16 to understand what the disagreement was.

17 THE COURT: Why if you're talking about it and he's
18 asking you what the problem is, why should you be filing the
19 motion before you tell him what the problem is?

20 MS. FOY: We've explained what the problem is, and he
21 doesn't seem to agree that it is an issue.

22 THE COURT: All right. When was this motion filed?

23 MS. FOY: Yesterday.

24 THE COURT: Yesterday. Is that on our list, Brian?

25 THE LAW CLERK: It's not on the list I gave you

1 yesterday before it was filed.

2 THE COURT: Say that again.

3 THE LAW CLERK: The list I made for you was made before
4 it was filed.

5 THE COURT: We have a new defendant motion. Do we have
6 it on the docket? Have you got a number?

7 THE LAW CLERK: I do. It is -- is it 166?

8 THE COURT: I don't know.

9 THE LAW CLERK: Motion to compel production of source
10 code and for entry of amendment to stipulated protective order;
11 is that right?

12 MS. FOY: Yes.

13 THE LAW CLERK: Okay.

14 THE COURT: Okay.

15 THE LAW CLERK: 166.

16 THE COURT: So you'll respond in a week.

17 MR. QUACKENBUSH: Okay.

18 THE COURT: Okay. Preparation of Valve's 30(b)(6)
19 witnesses.

20 MS. FOY: Low-level documents was the next issue.

21 THE COURT: Item four on your letter is preparation of
22 Valve's 30(b)(6) witnesses. Valve failed to properly prepare.
23 Refused to answer or produce additional witnesses. Is this the
24 subject we're talking about -- we're dealing with Newell and his
25 hard drive, or is this something else?

1 MS. FOY: No, these are other 30(b)(6) witnesses on the
2 topics, including Newell's hard drive, but others as well.

3 THE COURT: Exclude the hard drive. What else have we
4 got to talk about?

5 MS. FOY: Actually we sent a meet and confer letter.

6 THE COURT: Have you met and conferred?

7 MS. FOY: We have.

8 THE COURT: Have you made a motion?

9 MS. FOY: No.

10 THE COURT: What do we do to tee this up? I'm not going
11 to decide it today. In fact, I'm not going to decide it. But
12 how are we going to tee it up so somebody can decide it?

13 MS. FOY: Well, we asked for it to be on the agenda
14 today in order to specifically ask to bring a motion for a
15 further witness on specific topics from the 30(b)(6) depositions.

16 THE COURT: How many are there?

17 MS. FOY: I believe it's two that we'd like.

18 THE COURT: And how fast can you tee it up? How fast
19 can you file it? How long will it take to file the motion? I
20 want to do it on an expedited basis. I want to get all this
21 stuff on the table.

22 MS. FOY: I would say within a week.

23 THE COURT: Well, he's going to want a week to respond.

24 MR. QUACKENBUSH: Yes.

25 THE COURT: Is it something we can talk through? I

1 mean, once again it doesn't seem to me to be something we can
2 talk through, because if these witnesses have been taken, someone
3 is going to have to read the deposition of the 30(b)(6) witness
4 and see if there's a reason why -- what are you unhappy about?

5 MS. FOY: We have done what Your Honor requested. We
6 sent a very long, detailed letter identifying specific questions
7 and subject matter areas to which these 30(b)(6) witnesses were
8 noticed and were unable to provide responses.

9 So that letter is our meet and confer, and we've not gotten
10 any satisfactory response. I think we would either need to have
11 these people properly prepared, or have other witnesses offered.

12 THE COURT: Can we assume that your letter is your
13 motion, treat it as the motion, let him respond in a week, so
14 that we have it on the table in a week?

15 MS. FOY: That would be adequate.

16 MR. QUACKENBUSH: Well, Your Honor, just again, a little
17 context here, and I'm probably just being old fashioned about
18 this, we were talking about this on Thursday, and counsel said we
19 want you to produce some additional 30(b)(6) witnesses. I said
20 okay. You know, what topics are you concerned about?

21 Okay. They were going to send me a letter telling me
22 specifically what they're concerned about. And I said, you know,
23 we'd defer -- we stipulated we would defer our motion for a
24 protective order and give you the three witnesses, which we flew
25 down to San Francisco for their convenience from Bellevue,

1 Washington, and then we'll figure out if we still need a motion.

2 THE COURT: Are these the witnesses that you have flown
3 down?

4 MR. QUACKENBUSH: Yes, have already flown down. Three
5 witnesses for three full days of deposition. If they're -- you
6 know, again, maybe I'm not doing this right, but we were talking
7 about it on Thursday. My understanding was we were going to try
8 to work this out.

9 THE COURT: I'm still not understanding you. When you
10 talked about it Thursday, these depositions had already been
11 taken?

12 MR. QUACKENBUSH: They happened in July.

13 THE COURT: Okay. And what I hear her saying is that
14 she's not satisfied --

15 MR. QUACKENBUSH: That's right.

16 THE COURT: -- that those witnesses were properly
17 designated 30(b)(6).

18 MR. QUACKENBUSH: That's right.

19 MS. FOY: We sent a detailed letter explaining by
20 example. It's by no means exhaustive.

21 THE COURT: Have you got the letter?

22 MR. QUACKENBUSH: I've got the letter.

23 THE COURT: Can it be essentially teed up so somebody
24 can make a resolution of this thing by a responsive letter that
25 would respond? I mean, we don't need to go through a formal

1 motion and all that paperwork if the letter is your position on
2 the subject.

3 MS. FOY: It's not complete, Your Honor. It's by way of
4 example of numerous answers that were not provided by subject
5 matter.

6 THE COURT: But here's my problem, Ms. Foy. I don't
7 know how -- he presents a 30(b)(6) witness. You say, well, the
8 30(b)(6) couldn't answer some questions. So this could go on
9 forever.

10 How is it that we -- I mean, and how is it that a Judge can
11 even read the transcript? I mean, if the person -- if you said,
12 okay, we want someone who knows about product X and the 30(b)(6)
13 guy says I never heard of product X, I don't know anything about
14 it -- well, obviously that's bad.

15 MS. FOY: That's exactly what happened in these cases.

16 THE COURT: We're going to get a lot of nuances. My
17 concern is that my reading that 30(b)(6) deposition, it's going
18 to be very difficult for any Judge to know whether this person
19 has covered the waterfront or not. I mean, were there
20 instructions not to answer? Was there attorney/client privilege?

21 MS. FOY: No, this is a -- I would remind the Court also
22 that there is a pending motion that Valve has brought with
23 respect to Sierra's 30(b)(6) witness on the same kinds of
24 grounds, that he was purportedly not able to answer questions.

25 The fundamental issue is a party is obligated to produce a

1 30(b)(6) witness who's prepared to answer questions on the
2 designated topics, and their 30(b)(6) witnesses could not do
3 that. They could not answer questions. They were ignorant of
4 certain subject matters. They were purported to have had
5 discussions with appropriate employees and purported not to
6 remember what the employees told them.

7 Our letter points out examples of precisely those kinds of
8 problems with their witnesses. But it was not complete. It was
9 by way of example. And we'd be happy to supplement.

10 THE COURT: And so you bring a motion. I mean, you're
11 going to inundate the Court with motions, I mean both sides. I'm
12 not just saying it's the defendants. Both sides. Just bogging
13 us all down so that we're not making as much progress as I'd
14 like.

15 You want to make a motion. Do we have a motion -- is there a
16 motion by you on 30(b)(6) issues?

17 MR. QUACKENBUSH: On the Tan deposition that we
18 discussed last time.

19 THE COURT: And is that plaintiffs' third motion to
20 compel?

21 MS. FOY: Yes.

22 MR. QUACKENBUSH: Yes.

23 THE COURT: Have I got the third motion to compel?

24 THE LAW CLERK: I think you do.

25 THE COURT: The second or the third motion to compel?

1 There are so many motions --

2 MR. HOLTMAN: The third.

3 THE COURT: Hmm?

4 MR. HOLTMAN: The third.

5 MR. QUACKENBUSH: Your Honor --

6 THE COURT: And that's the one that's been renoted till
7 the 24th.

8 MR. QUACKENBUSH: That's right. Your Honor, maybe I'm
9 not approaching this in the right way. I don't think we need all
10 these motions either. Some are unavoidable. But my
11 understanding is that when we talked on Thursday they were going
12 to say we'll send you all the things we're concerned about. You
13 tell me if you're going to produce new witnesses. And next --
14 before we have -- before I get the letter, before we talk about
15 it again, we find ourselves here with a --

16 Maybe I'm not doing it the right way. I think you're
17 supposed to try to work these things out. We never said we
18 wouldn't produce another witness. We just said tell us
19 specifically what it is you're unhappy about. Not examples. The
20 whole list.

21 THE COURT: All right. Here's what I'm going to want
22 you to do, is to meet and confer again face-to-face. And if you
23 can't reach agreement, file a motion on an expedited basis. Or
24 do it in a letter form, here's why it's not satisfactory. Attach
25 a copy of the deposition that was taken. In letter form you can

1 respond and tell us why it was.

2 In other words, see if you can work out a procedure for -- I
3 use the word teeing it up. I mean, I think we can do it less
4 formally than the motion practice that takes some time to get it
5 on the table.

6 I mean, what I want to try and do is in a couple of weeks
7 have an opportunity for someone who has all the disputes that
8 you've got and get them resolved, and have something meaningful
9 from each side in a way that we can do that.

10 So we'll just put this on the -- I'm going to defer, you're
11 going to meet and confer on both the production of the source --
12 the protective order and how that works, but also get your
13 responses in, and this witness business.

14 We have one more issue, production of low-level documents.

15 MR. QUACKENBUSH: This is my favorite one on the list,
16 so I'd be happy to address this. Again, we were talking about
17 this Thursday. They say, you know, a lot of these low-level
18 documents, you can get the same information by summary documents
19 and reports. We sent you a whole bunch of samples we'd like you
20 to look at, which I didn't happen to have at that time. I said,
21 okay, I'll be happy to look at them, and I'll get back to you.

22 The next thing I know is here we are. I'm happy to look --
23 I'm happy to be practical, and if there are easier ways to get
24 this that still gets us what we need, I'll be happy to look at
25 it. But I just need a chance to do it. I think the meet and

1 confer process is designed to sort of work through that, rather
2 than running over here every time.

3 THE COURT: Well, I agree. On the other hand -- I agree
4 with exactly what you're saying. On the other hand, I've kind of
5 committed to make myself available when you ask, either side
6 asks.

7 MS. FOY: Your Honor, our concern was the imminent close
8 of discovery and the fact that these low-level documents are
9 voluminous and would require hundreds and hundreds of employee
10 hours trying to search through boxes.

11 If we in fact are going to have to produce these documents,
12 we need to get that process under way now. We were asking for
13 cooperation from opposing counseling. If all of this information
14 is duplicative of something that appears in summary spreadsheets
15 or other database ones that we've offered to produce, we would
16 like to spare our employees the hundreds of hours of having to go
17 through boxes looking for invoices. And we felt that it was
18 important to get this before the Court so that we could bring a
19 motion for a protective order, if necessary.

20 THE COURT: All right. Well, I'm going to table this
21 one. I think we've got to see if you can reach agreement on it.
22 It seems to me that -- going back to recap then on this letter of
23 September 15th from Ms. Foy -- I've kind of lost track what we
24 decided to do on the destruction of documents.

25 MR. QUACKENBUSH: I think we're going to have a -- you

1 order a limited dep, Your Honor.

2 THE COURT: A limited dep with Mr. Newell.

3 MR. QUACKENBUSH: Right.

4 THE COURT: And see where we are. Thank you. And with
5 respect to two, I've denied the stay of discovery, but I've
6 extended the discovery deadline to 12/31. And I've deferred on
7 this source code of Valve and the 30(b)(6) witnesses, and ask you
8 to either -- on the source code business, you're going to respond
9 in a week, as I recall. And on the preparation of the witnesses,
10 you're going to discuss it and tee it up in some way so that it
11 can be resolved quickly. We're going to table item five.

12 MS. FOY: Your Honor, with respect to item five, we do
13 have --

14 THE COURT: The low-level documents.

15 MS. FOY: That's right. We do have a concern about
16 having to produce all these invoices and purchase orders by the
17 end of September, and would ask for an extension on our deadline
18 for production. This is just many countries, as many as 10
19 different foreign languages. It is exceedingly difficult to try
20 to compile these documents if we can't reach agreement.

21 THE COURT: I don't have a -- you haven't given me
22 enough to rule on a deferral. If you've got a deadline, it seems
23 to me you've got to meet it. Can't you -- give me an example.

24 MS. FOY: The example of letters of credit securing the
25 purchase of various Sierra products. This information is all

1 captured on sales and royalty documents that we've already
2 produced and on transaction documents that we are running
3 database searches and will produce.

4 The information is completely duplicated, but it will require
5 many, many person hours to try to go through files to pull
6 letters of credit relevant to Valve's documents. Purchase
7 orders--

8 THE COURT: I'm not going to -- I can't, I don't have
9 the time to resolve it today. How can we get the information we
10 need so that someone can resolve it?

11 MS. FOY: I would ask that counsel review our proposal
12 and give us an immediate response.

13 THE COURT: He's already said that he was going to do
14 that.

15 MS. FOY: If we can have a date certain by which we'll--

16 THE COURT: All right. That's fair, a date certain.

17 MS. FOY: -- we can proceed, otherwise we'll have to
18 bring a protective order.

19 THE COURT: All right. When are you going to be able to
20 respond?

21 MR. QUACKENBUSH: Wednesday.

22 THE COURT: Next Wednesday?

23 MR. QUACKENBUSH: Yes.

24 THE COURT: That would be the 22nd. Okay. And if you
25 don't, if you're not satisfied with the response, then I guess

1 you have a right to bring a motion. And if you bring a motion,
2 let's do it on an expedited basis, where you make your motion,
3 with a week to respond. No replies. And then we just have -- we
4 get it up there.

5 MR. QUACKENBUSH: Yeah, that's great.

6 MS. FOY: Yes, that's fine.

7 MR. QUACKENBUSH: If we could get everything off the
8 table that would be great.

9 THE COURT: Just let me just look.

10 (Brief Pause.)

11 THE COURT: All right. I'll tell you what I'm going to
12 do: I'm going to refer these three issues that appear to be
13 headed towards having to be resolved and any other discovery
14 issues to Judge Theiler.

15 I'm hoping that she can give you more time and on a more
16 expedited basis resolve these things. I just -- I will discuss
17 with her my views on how things ought to proceed, and she will
18 have the benefit of the transcript from July and this transcript,
19 so it's good that we have a transcript.

20 We'll enter a minute order that refers the pending and any
21 future discovery disputes to her. And to the extent there are
22 hearings, if I'm available, I'll sit in, but I want it to keep
23 moving.

24 MR. QUACKENBUSH: Mm-hmm.

25 THE COURT: And I just think that a lot of these are

1 important issues, and it's just not possible to do it on
2 shortened time and with limited information. And I'm getting
3 different views, of course.

4 MR. QUACKENBUSH: Your Honor, one -- I'm sorry.

5 THE COURT: No, I'm all through with mine.

6 MS. FOY: Will Judge Theiler rule on pending motions
7 then?

8 THE COURT: Pending discovery motions.

9 MS. FOY: Yes.

10 THE COURT: Yes.

11 MR. QUACKENBUSH: We want to bring the Court's attention
12 to some of the serious problems that we've had in the discovery,
13 and it's a story that takes a little bit of time to tell. We
14 think we haven't been treated well, and we think it's
15 sanctionable. I don't want to belabor the point. But is that a
16 motion you would want to reserve, or is that a motion that Judge
17 Theiler should hear?

18 THE COURT: Well, I haven't seen the -- if you need to
19 bring the motion, bring the motion. It seems to me that Judge
20 Theiler is probably going to jump in more deeply into this thing.
21 And I am going to tell her that if she is not satisfied -- if
22 she's satisfied that these motions -- that one side or the other
23 is not proper, that there ought to be sanctions in every
24 situation.

25 In other words, if you bring the motion to compel for

1 whatever and if you lose out on the argument, there ought to be
2 -- you ought to be able to work most of this stuff out. And you
3 ought to be able to do it in a professional way.

4 And, I mean, my fear is if you bring such a motion I would
5 have to revisit all the other discovery issues that she will have
6 been weighing in on. Are you talking about things we've been
7 talking about today?

8 MR. QUACKENBUSH: And many other things. Again, I don't
9 want to belabor the point. I don't ever talk about things like
10 this lightly, but I think it needs to be addressed.

11 THE COURT: Is this something that you have talked with
12 counsel about?

13 MR. QUACKENBUSH: Well, I've certainly complained about
14 it a lot. And whenever I'm -- I'm sure they're tired of hearing
15 about it. I don't think -- yeah, I haven't said, look, I think
16 you ought to pay us this amount of money, because we've been --
17 had to work so much harder than we should have. You're right, I
18 haven't said that. I haven't laid that out.

19 THE COURT: I mean, is this a -- if we had an hour to
20 talk, just meet, talk about it, without any motion or ruling on
21 it, would that help clear the air, do you think?

22 MR. QUACKENBUSH: Yeah, sure. I don't want to -- again,
23 and I'm not -- I like to work these things out. I think it's
24 better, it's more professional, and it's a lot less expensive.
25 My client, for once -- for once my client is the little guy here.

1 And, you know, this a 50 billion corporation over here. And so,
2 you know, we're having to work harder than we should have had.

3 THE COURT: Well, I think you ought to meet and confer,
4 and then if you're still inclined to -- if you think that a
5 meeting with a Judge or Judges would be appropriate -- it might
6 be something that Judge Theiler and I would both sit in on, try
7 and schedule something.

8 MR. QUACKENBUSH: Okay.

9 THE COURT: Not for the purpose of ruling on anything,
10 but for the purpose of understanding the problems, and, if
11 necessary, authorize you to file a formal motion, or do whatever
12 you need to do.

13 MR. QUACKENBUSH: All right. That's fair.

14 THE COURT: If you think that that's not the way to
15 approach it and you would rather have him do it just in a formal
16 motion, then I guess he should do whatever he needs to do.

17 MS. FOY: We're certainly willing to meet and confer.

18 THE COURT: Keep your voice up.

19 MS. FOY: I'm sorry, we're certainly willing to meet and
20 confer on what these remaining issues are.

21 THE COURT: All right.

22 MS. FOY: I had one final non-discovery issue, if I
23 could, Your Honor. We have a September 22 deadline for the
24 parties to engage in settlement discussions and exchange demands,
25 and I've been talking to Mr. Quackenbush about the possibility

1 that those discussions should take place party to party, rather
2 than through counsel. It would be more efficient. They've
3 agreed, but the parties have not yet had an opportunity to have
4 that discussion. We wanted to put over that deadline.

5 THE COURT: What are you proposing?

6 MS. FOY: I don't know. We haven't yet scheduled any
7 kind of meeting between them -- between the principals. Maybe
8 two weeks or so. Would that be --

9 THE COURT: Let's give it 30 days.

10 MR. QUACKENBUSH: Sure.

11 THE COURT: People are busy.

12 MS. FOY: That would be great. Thank you.

13 THE COURT: And that is -- just for the minutes, that
14 would be -- it's not a mediation deadline. It's a --

15 MR. SCOTT: Rule 39.1 meet and confer settlement.

16 THE COURT: Thank you.

17 MR. HOLTMAN: Could I ask one quick question, Your
18 Honor? With the extended deadline, is it pulling expert reports
19 along as well?

20 THE COURT: You guys go back and talk, would you?

21 MR. HOLTMAN: Okay.

22 THE COURT: We'll be in recess.

23 (Recess.)

24

25

CERTIFICATE

I, Joseph F. Roth, Official Court Reporter, do hereby
certify that the foregoing transcript is correct.

S/Joseph F. Roth

Joseph F. Roth